Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 21 JANUARY 28, 1987 No. 4

This issue contains:

AVAILABILITY OF BOUND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 87–2)

APPROVAL OF DIXIE SERVICES INC., AN INDEPENDENT COMMERCIAL LABORATORY, TO ANALYZE IMPORTED PETROLEUM AND PETROLEUM PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of approval.

SUMMARY: Pursuant to § 151.47(b), Customs Regulations (19 CFR 151.47(b)), Dixie Services Incorporated, 1706 First Street, Galena Park, Texas 77547, has applied to Customs for approval as an independent commercial laboratory to analyze imported petroleum and petroleum products. It has been determined that Dixie Services, Inc., meets all of the requirements to be a Customs approved independent commercial laboratory.

Accordingly, the application of Dixie Services Incorporated to analyze imported petroleum and petroleum products in all Customs districts is approved.

EFFECTIVE DATE: January 7, 1987.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–2446).

Dated: January 8, 1987.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

[Published in the Federal Register, January 20, 1987 (52 FR 2172)]

(T.D. 87–3)

QUARTERLY RATES OF EXCHANGE

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified

to the Secretary of the Treasury by the Federal Reserve of New York under provisions of section 522(c), Tariff Act of 1930, as amended (31 USC 5151), for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulation (19 CFR 159, Subpart C).

Quarter beginning: January 1, 1987 through March 31, 1987.

Country	Name of currency	U.S. dollars
Australia	Dollar	0.665800
Austria	Schilling	0.074074
Belgium	Franc	0.025044
Brazil	Cruzado	0.067137
Canada	Dollar	0.725426
China, P.R.	Renimbi yuan	0.267996
Denmark	Krone	0.137552
Finland	Markka	0.210305
France	Franc	0.157418
Germany	Deutsche mark	0.521376
Hong Kong	Dollar	0.128535
India	Rupee	0.076805
Iran	Rial	N/A
Ireland	Pound	1.413000
Italy	Lira	0.000748
Japan	Yen	0.006319
Malaysia	Dollar	0.384763
Mexico	Peso	N/A
Netherlands	Guilder	0.461787
New Zealand	Dollar	0.525500
Norway	Krone	0.136240
Philippines	Peso	N/A
Portugal	Escudo	0.006901
Rep. So. Africa	Rand	0.462000
Singapore	Dollar	0.460829
Spain	Peseta	0.007669
Sri Lanka	Rupee	0.035045
Sweden	Krona	0.148423
Switzerland	Franc	0.621118
Thailand	Baht (tical)	0.038314
United Kingdom	Pound	1.490000
Venezuela	Bolivar	N/A

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–4)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 1, 1986	$.007267
December 2, 1986	.007289
December 3, 1986	.007231
December 4, 1986	.007225
December 5, 1986	.007138
Israel shekel:	
December 1–5, 1986	N/A
South Korea won:	
December 1, 1986	.001151
December 2, 1986	.001135
December 3, 1986	.001152
December 4, 1986	.001151
December 5, 1986	.001150
Taiwan N.T. dollar:	
December 1, 1986	.027548
December 2, 1986	.027556
December 3, 1986	.027563
December 4, 1986	.027571
December 5, 1986	.027579

(LIQ–03–01 S:COM CIE)

Dated: December 5, 1986.

Angela DeGaetano,
Chief,
Customs Information Exchange.

(T.D. 87–5)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 8, 1986	$.007092
December 9, 1986	.007067
December 10, 1986	.007100
December 11, 1986	.007057
December 12, 1986	.007047
Israel shekel:	
December 8–12, 1986	N/A
South Korea won:	
December 8, 1986	.001150
December 9–10, 1986	.001149
December 11, 1986	.001148
December 12, 1986	.001149
Taiwan N.T. dollar:	
December 8, 1986	.027586
December 9, 1986	.027609
December 10, 1986	.027640
December 11, 1986	.027655
December 12, 1986	.027663

(LIQ–03–01 S:COM CIE)

Dated: December 12, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–6)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), has certified

buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 15, 1986	$.007057
December 16, 1986	.007027
December 17, 1986	.007037
December 18, 1986	.007052
December 19, 1986	.007047
Israel shekel:	
December 15–19, 1986	N/A
South Korea won:	
December 15, 1986	$.001148
December 16, 1986	.001148
December 17, 1986	.001148
December 18, 1986	.001150
December 19, 1986	.001152
Taiwan N.T. dollar:	
December 15, 1986	$.027701
December 16, 1986	.028523
December 17, 1986	.028555
December 18, 1986	.027801
December 19, 1986	.027824

(LIQ–03–01 S:COM CIE)

Dated: December 19, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–7)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: December 25, 1986.

Greece drachma:	
December 22, 1986	$.007143
December 23, 1986	.007189
December 24, 1986	.007148
December 26, 1986	.007199
Israel shekel:	
December 22–26, 1986	N/A
South Korea won:	
December 22, 1986	.001153
December 23, 1986	.001155
December 24, 1986	.001155
December 26, 1986	.001156
Taiwan N.T. dollar:	
December 22, 1986	.027863
December 23, 1986	.027949
December 24, 1986	.027980
December 26, 1986	.028003

(LIQ–03–01 S:COM CIE)

Dated: December 26, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–8)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
December 29, 1986	$.007192
December 30, 1986	.007174
December 31, 1986	.007236
Israel shekel:	
December 29–31, 1986	N/A
South Korea won:	
December 29–31, 1986	.001156

Taiwan N.T. dollar:	
December 29, 1986	.028043
December 30, 1986	.028082
December 31, 1986	.028129

(LIQ–03–01 S:COM CIE)

Dated: December 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–9)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–180 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Japan yen:	
December 1, 1986	$.006163
December 3, 1986	.006163
December 4, 1986	.006144
December 5, 1986	.006157

(LIQ–03–01 S:COM CIE)

Dated: December 5, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–10)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New

York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–180 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Japan yen:	
December 8, 1986	$.006158
December 9, 1986	.006150
December 10, 1986	.006144
December 11, 1986	.006146
December 12, 1986	.006133

(LIQ–03–01 S:COM CIE)

Dated: December 12, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–11)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–180 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
December 16, 1986	$.66370
December 17, 1986	.66450
December 18, 1986	.66450
December 19, 1986	.66940
Brazil cruzado:	
December 16, 1986	.068601
December 17, 1986	.068601
December 18, 1986	.068601
December 19, 1986	.068283

Japan yen:	
December 15, 1986	.006126
December 16, 1986	.006099
December 17, 1986	.006111
December 18, 1986	.006135
December 19, 1986	.006127
New Zealand dollar:	
December 15, 1986	.51600
December 16, 1986	.51420
December 17, 1986	.51650
December 18, 1986	.52050
December 19, 1986	.52150

(LIQ–03–01 S:COM CIE)

Dated: December 19, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87–12)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c)), Tariff Act of 1930, as amended (31 U.S.C. 5151), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86–180 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
December 22, 1986	$.67520
December 23, 1986	.66450
Brazil cruzado:	
December 22, 1986	.067958
December 23, 1986	.067797
December 24, 1986	.067797
December 26, 1986	.067632
Japan yen:	
December 22, 1986	.006144
December 23, 1986	.006146

New Zealand dollar:	
December 22, 1986	.52750
December 23, 1986	.52150
December 24, 1986	.52250
December 26, 1986	.52250

(LIQ-03-01 S:COM CIE)

Dated: December 26, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 87-13)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-180 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
December 29, 1986	$.66280
December 30, 1986	.66380
December 31, 1986	.66530
Brazil cruzado:	
December 29, 1986	.067299
December 30, 1986	.067137
December 31, 1986	.067137
Germany deutsche mark:	
December 31, 1986	.519886
Netherlands guilder:	
December 31, 1986	.460299
New Zealand dollar:	
December 29, 1986	.52380
December 30, 1986	.52420
December 31, 1986	.53050

(LIQ–03–01 S:COM CIE)
Dated: December 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notice

CSD 86–21; EFFECT OF RULING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice discusses two issues regarding a ruling issued as CSD 86–21.

FOR FURTHER INFORMATION CONTACT: On Issue No. 1: Allan L. Martin, Assistant Chief Counsel, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–2482), on Issue No. 2: William G. Rosoff, Drawback and Bonds Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5856).

SUPPLEMENTARY INFORMATION: Notice is given to clarify two issues with respect to the ruling published as CSD 86–21 in 20 Cust. Bull. No. 33, page 21, on August 20, 1986. The ruling also was issued as Legal Determination 86–0021 on August 22, 1986, in the U.S. Customs Service Policies and Procedures Manual.

ISSUE No. 1

The Customs Service is taking the position that it must honor its obligations to enforce the laws of other Federal Agencies regardless of when those Agencies determine that imported merchandise is not admissible into the commerce of the United States. Even if the other Agency does not make the determination of inadmissibility until after the Customs entry has been liquidated and that liquidation is final, the Customs Service, when directed by the responsible Federal Agency, will demand that the bond obligors prove proper exportation or destruction of the inadmissible merchandise or such other performance as may be required by the other Agency. Unless the bond obligors satisfy that other Agency, the Customs Service, if requested by that other Agency, will consider the Customs bond to be breached and will demand payment of liquidated damages under that bond. The Department of Justice has agreed to pursue judicial collection action if those demands for liquidated damages are unsatisfied. Thus, for the purposes of a determination of admissibility

when that determination is the legal responsibility of another Federal Agency, the Customs Service will consider liquidation of the Customs entry to be irrelevant to the determination of admissibility. In those cases, liquidation of the Customs entry will apply only to the Customs classification and value decisions on the imported merchandise.

ISSUE NO. 2

The second issue concerns the effect of liquidation and was discussed at pages 27–31 in the Customs Bulletin and at pages 9–14 in the Legal Determination. At page 31 in the Customs Bulletin (page 13 in the Legal Determination) in the first full paragraph, the second sentence states:

> After liquidation *upon expiration of the protest period* further consideration of the matter is barred *unless there is a valid reliquidation* under 19 U.S.C. 1521 or other law. (emphasis added)

One such other law is 19 U.S.C. 1501 which provides that a liquidation may be reliquidated in any respect by the appropriate Customs officer on his own initiative within 90 days from the date on which notice of the original liquidation is given. The words of the statute "may be reliquidated in any respect" are broad enough to allow a timely correction of any error in a liquidation, including one on admissibility, provided that statute's procedures are followed. A liquidation is a final decision in the sense that the statutory scheme requires that unless it is vacated and another decision substituted in its place within the specified limited time periods, a liquidation stands and cannot be challenged under the Customs laws.

Dated: January 9, 1987

HARVEY B. FOX,
Acting Director,
Office of Regulations and Rulings.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

PROPOSED CONSOLIDATION OF CLEVELAND AND AKRON, OHIO, PORTS OF ENTRY; PROPOSED DESIGNATION OF AKRON, OHIO, AS A CUSTOMS STATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to consolidate the ports of entry of Cleveland and Akron, Ohio, and to designate Akron, Ohio, as a Customs station. The consolidated port would be known as the Cleveland port of entry and would be within the Cleveland district. The Akron station would be supervised by the Cleveland port. The proposal, if adopted, would allow more efficient use of Customs personnel, facilities, and resources. This would be accomplished by transferring the administrative functions of the Akron port to the Cleveland district office, and by eliminating some positions from the Akron port. The consolidated port boundaries would consist of the total area within the existing boundaries of both ports.

DATE: Comments must be received on or before March 16, 1987.

ADDRESS: Written comments (preferably in triplicate) should be addressed to, and may be inspected at, the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Denise Crawford, Office of Inspection and Control (202–566–9425).

SUPPLEMENTARY INFORMATION:

Background

The Customs Service field organization currently consists of seven geographical regions further divided into districts, with ports within each district. Customs ports of entry are locations (seaports, airports, or land border ports) where Customs officers or employees are assigned to accept entries of merchandise, collect duties, clear

passengers, vehicles, vessels, and aircraft, examine baggage, and enforce the Customs, and related laws.

Similar activities take place at Customs stations. However, the significant difference between ports of entry and stations is that at stations, the Federal government is reimbursed for:

(1) The salaries and expenses of its officers or employees for services rendered in connection with the entry and clearance of vessels; and

(2) Except as otherwise provided by the Customs Regulations, the expenses (including any per diem allowed in lieu of subsistence), but not the salaries of its officers or employees, for services rendered in connection with the entry or delivery of merchandise.

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs is proposing to consolidate the ports of entry of Cleveland and Akron, Ohio, and proposing to designate Akron, Ohio, as a Customs station. The consolidated port would be known as the Cleveland port of entry and be within the Cleveland district. The Akron station would be supervised by the Cleveland port.

The proposal would permit relocation of the Akron port administrative functions to the Cleveland district office. The current Akron port offices are located less than one hour's drive from the Cleveland district office. The administrative staff at Akron is not currently fully utilized because of limited workload volume. The new consolidated port boundary would consist of the total area within the existing boundaries of both ports. The Cleveland port consists of all of Cuyahoga County, Ohio. The Akron port consists of all of Summit County, Ohio, and Lake Township in Stark County, Ohio. The port consolidation would result in savings of approximately $110,000 per year.

The proposed staffing at the Akron station would consist of two Customs inspectors, the same number currently assigned to the port. The positions of Port Director, Customs Aid, and Clerk Typist, could be eliminated. Elimination of these positions would have no immediate impact on any identifiable segment of the public; it is merely an administrative reorganization. Entry releases and entry summaries could still be filed at Akron.

If this proposal is adopted, the list of Customs regions, districts, and ports of entry, and the list of Customs stations, as set forth in §§ 101.3(b) and 101.4(c), Customs Regulations (19 CFR 101.3(b), 101.4(c)), will be amended to reflect the consolidation of the ports and the designation of a Customs station.

Executive Order 12291 and Regulatory Flexibility Act

Because this document relates to agency organization it is not subject to E.O. 12291. Accordingly, a regulatory impact analysis and the review prescribed by § 3 of that E.O. are not required. Similarly,

this document is not subject to the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 *et seq.*) and the regulatory analysis and other requirements of 5 U.S.C. 603 and 604 are not applicable.

Customs routinely establishes, expands, or consolidates ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this amendment may have a limited effect upon some small entities in the area affected, it is not expected to be significant because establishing, expanding, or consolidating port limits in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

Proposed Amendments

It is proposed to amend Part 101, Customs Regulations (19 CFR Part 101), as set forth below.

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1, 66, 1202 (Gen. Hdnote 11), 1624; Reorganization Plan 1 of 1965; 3 CFR 1965 Supp.

2. It is proposed to amend the list of regions, districts, and ports of entry in § 101.3(b) as follows:

In the North Central Region-Chicago, Ill., under the column headed "Ports of entry", in the listing for CLEVELAND, OHIO, the number "77–232" would be removed and the number of the T.D. which adopted this proposal inserted in its place. Further, the listing for Akron, Ohio, would be removed.

3. It is proposed to amend the list of Customs districts, stations, and ports of entry having supervision, in § 101.4(c) as follows:

By adding "Akron, Ohio" in the column headed "Customs stations" immediately opposite "Cleveland, Ohio" in the column headed "District", and by adding "Cleveland" on the same line in the column headed "Ports of entry having supervision". The existing listings of Customs stations in the Cleveland district would drop down one line, but remain as listed.

Comments

Before adopting these proposals, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with

the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

MICHAEL SCHMITZ,
Acting Commissioner of Customs.

Approved: December 30, 1986.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, January 14, 1987 (52 FR 1470)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–137)

R.J.F. FABRICS, INC., PLAINTIFF *v.* UNITED STATES, U.S. CUSTOMS SERVICE, REGIONAL COMMISSIONER OF CUSTOMS AT NEW YORK, AND THE AREA DIRECTOR OF CUSTOMS AT NEWARK, DEFENDANTS

Court No. 86–11–01376

Before TSOUCALAS, *Judge.*

[Action stayed, in favor of related criminal proceedings, for a period of twenty-one (21) days.]

(Decided December 22, 1986)

Soller, Singer & Horn (Melvin E. Lazar, Gerald B. Horn, and *Carl R. Soller)* for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice *(Florence M. Peterson)* for defendants.

OPINION AND ORDER

TSOUCALAS, *Judge:* This action is before the Court on motion of the federal defendants [hereinafter collectively referred to as "defendant" or "United States"] to stay during the resolution of criminal proceedings instituted in the District Court for the Southern District of New York; or alternatively, for a protective order, pursuant to USCIT R. 26(c), limiting discovery by plaintiff. The factual background of this case was discussed in a recent opinion in which the Court exercised jurisdiction over plaintiff's claim. *See R.J.F. Fabrics, Inc.* v. *United States,* 10 CIT ——, Slip. Op. 86–123 (Dec. 1, 1986).[1] Therefore, this opinion will focus only on those developments germane to the issue presently under consideration.

BACKGROUND

This action concerns the alleged transshipment of textiles from Korea to Japan and the attempted entry into the United States of these textiles under allegedly false documents in an attempt to vio-

[1] The Court also denied a motion for a preliminary injunction turning over custody of the textiles to plaintiff. *See R.J.F. Fabrics, Inc.,* Slip. Op. 86–123 at 15.

late quota restraints. The investigation of plaintiff is part of a wider probe begun early in 1984 and initially based in California. From that beginning, the inquiry by Customs spread both domestically to the East Coast, and internationally, to Korea, Japan, Singapore, and Canada. Defendant alleges that significant evidence of fraudulent entry of more than 50 million yards of fabric was uncovered. Ms. Deirdre Daly, an Assistant United States Attorney, was assigned responsibility for the criminal case in November, 1985. In connection with the criminal investigation, a number of search warrants were issued, including one dated Aug. 11, 1986, which was directed against plaintiff's premises in New York.

The subject merchandise was first denied entry[2] on July 2 and July 11, 1986, and later seized by the Customs Service pursuant to 19 U.S.C. § 1592 (1982) and 18 U.S.C. § 545 (1982). Jurisdiction over the action was assumed for the purpose of issuing a declaratory judgment as to the true country of origin of the goods. On Dec. 9, 1986, the Court issued a scheduling order setting Jan. 6, 1987 as the trial date and fixing Dec. 22, 1986 for the completion of discovery. That order was later amended at the request of the parties, to allow plaintiff to depose one of defendant's witnesses on Jan. 5, 1987, and to reschedule trial for Jan. 7, 1987. Following the presentation of the criminal case against plaintiff to a grand jury sitting in the Southern District of New York, defendant, on Dec. 16, 1986, filed the instant motion. Also on that date, Mr. Mark Cassuto, described by defendant as plaintiff's buying agent,[3] was arrested on a warrant issued by a United States Magistrate. At a deposition held on Dec. 17, 1986, Mr. Isaac Cavaliero, Secretary/Treasurer of plaintiff, invoked his Constitutional privilege against self-incrimination after giving his name, address, phone number, and occupation.

At the request of plaintiff's counsel, on Dec. 17, 1986, a conference was held in chambers, with a court reporter present, between the Court, counsel for the parties, Ms. Deirdre Daly, an Assistant United States Attorney, Ms. Deborah Rand, Assistant Regional Counsel for Customs, and Mr. Steven Yagoda, a criminal investigator for Customs.[4] Over plaintiff's objection, the Court viewed, *in camera,* certain materials presented by Ms. Daly and Mr. Yagoda, relevant to Customs' investigation of the alleged transshipment scheme.

The Motion for a Stay

Defendant urges the Court to stay this action now that a grand jury has heard the case against plaintiff presumably regarding al-

[2] Customs instituted "live" entry procedures, effective July 7, 1986, with respect to certain textiles reputed to be products of Japan. This type of entry prevents the importer from exercising immediate delivery privileges. 51 Fed. Reg. 23,736 (1986).

[3] At a conference with the Court, plaintiff's counsel, without elaboration, denied that Mr. Cassuto was plaintiff's buying agent. Mr. Cassuto's attorney, in a letter to defendant, has described his client as acting as an "importer's agent." Further, he explained that Mr. Cassuto has been advised to assert his fifth amendment privilege at a deposition to be held on Dec. 22, 1986. Letter from Angelo T. Cometa to Florence M. Peterson (Dec. 18, 1986).

[4] Plaintiff's counsel, indicating that they did not wish to delay resolution of the motion, declined to submit papers in response to defendant's motion. As explained in the text, however, counsel for plaintiff participated in the conference with the Court.

leged violation of 18 U.S.C. § 542 (1982) and 18 U.S.C. § 545 (1982).[5] Defendant fears that the criminal prosecution against this plaintiff as well as the larger investigation into the problem of transshipment will be compromised. *Defendant's Motion to Stay* at 11. The Assistant United States Attorney in charge of this matter has opined that:

> the continuation of this civil case in the United States Court of International Trade will impede the ongoing criminal investigations conducted by this office and special agents of the United States Customs Service, and will result in the disclosure of confidential investigatory procedures which will impair these and future investigations.

Defendant's Motion to Stay, Attachment F, Affidavit of Deirdre Daly at 3, ¶14.

Defendant insists that the country of origin issue in the civil litigation is necessarily intertwined with the subject matter of the criminal proceeding, and one cannot be neatly extricated from the other. Not only will disclosure under the liberal civil discovery rules thwart other investigations into transshipment, but it will also give plaintiff access to material it could not discover under the rules of criminal procedure. Defendant's ability to conduct discovery has been frustrated by Isaac Cavaliero's exercise of his fifth amendment privilege, as well as by the arrest of Mark Cassuto. Finally, under its interpretation of Fed. R. Crim. P. 6(e), no discovery may be had of matters presented before the grand jury without authorization of the district court which impanelled the grand jury.[6] Thus, absent such authorization, defendant, could not fulfill plaintiff's broad discovery requests. These include a notice of intent to depose several Customs special agents, the Customs attache in Tokyo, and a foreign national employed by Customs, as well as a request for the production of all documents or objects, relating to the exclusion and seizure of the subject textiles, including:

> [a]ll records, notes, reordings [sic] and/or other documents or objects relating to the exclusion, detention and seizure of the merchandise * * * including but not limited to, reports of investigation, correspondence, telexes, bills of lading, air waybills,

[5] 18 U.S.C. § 542 (1982) provides in pertinent part:

§ 542. Entry of goods by means of false statements

Whoever enters * * * into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, * * *.

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. § 545 (1982) provides in pertinent part:

§ 545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

* * * * * * * *

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[6] Fed. R. Crim. P. 6(e)(3) provides in relevant part:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

* * * * * * * *

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened.

The Court does not rely on defendant's interpretation of Rule 6(e) and accordingly expresses no opinion as to its accuracy.

transcripts of conversations, affidavits, laboratory analyses, and any other documents or objects which purport to establish the country of origin of the subject merchandise.

Defendant's Motion to Stay, Attachment E, Plaintiff's Notice of Taking Deposition and for Production of Things at 2.

Given all of the foregoing, defendant contends that the best course for this Court to follow is to exercise its discretion to stay this action pending resolution of the criminal case against plaintiff.

Plaintiff's response, as best the Court can comprehend it, is that the pending criminal proceedings, still in the pre-indictment stage, should not interfere with its ability to conduct discovery in a properly commenced civil case. In any event, the possibility of an indictment should represent an opportunity for the potential criminal defendant, not the government, to seek a stay.

DISCUSSION

Numerous cases support the proposition that a court properly vested with jurisdiction may exercise broad discretion in deciding to stay a civil action in favor of a related criminal proceeding. *See United States* v. *Kordel,* 397 U.S. 1, 11–12 (1970); *Mid-America's Process Service* v. *Ellison,* 767 F.2d 684, 687 (10th Cir. 1985); *Campbell* v. *Eastland,* 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963); *Founding Church of Scientology* v. *Kelley,* 77 F.R.D. 378, 380–81 (D.D.C. 1977); *SEC* v. *Control Metals Corp.,* 57 F.R.D. 56, 57 (S.D.N.Y. 1972); *United States* v. *One 1964 Cadillac Coupe de Ville,* 41 F.R.D. 352, 353–54 (S.D.N.Y. 1966); *United States* v. *Parrott,* 248 F. Supp. 196, 201–02 (D.D.C. 1965). The Court believes that given the developments in the criminal investigation, a temporary stay of the instant action would best serve the interests of justice. In particular, given the similarity of issues between the two cases, this Court, in accord with other courts that have considered the question of parallel proceedings, is concerned that there is a strong potential for the misuse of the civil discovery process. *See, e.g., United States* v. *Phillips,* 580 F. Supp. 517, 518–19 (N.D. Ill. 1984) citing *Campbell* v. *Eastland,* 307 F.2d at 487.[7]

It is well known that discovery in federal criminal cases, governed largely by the Federal Rules of Criminal Procedure, is more restrictive than in civil cases. *See United States* v. *Fischel,* 686 F.2d 1082, 1090–91 (5th Cir. 1982). *Compare* Fed. R. Crim. P. 15–17 *with* USCIT R. 26–37. For example, depositions, which are routine vehicles for civil discovery, are not favored in criminal cases. *Fischel,* 686 F.2d at 1091; *see also* Fed. R. Crim. P. 15(a) advisory committee's note ¶2 ("It was contemplated that in criminal cases depositions would be used only in exceptional situations, as has been the practice heretofore"). Further, in criminal cases, 18 U.S.C. § 3500

[7] This case, involving proceedings in two *federal* courts, presents an even more compelling argument for granting a stay than that in *Phillips,* since it does not implicate the historic reluctance of the federal courts to interfere with state court actions. *Cf. Phillips,* 580 F. Supp. at 519.

generally bars a defendant's access to statements or reports of a government witness until that witness has testified on direct examination at trial. 18 U.S.C. § 3500(a) (1982); *see also* Fed. R. Crim. P. 16(a)(2) (discussing discovery of government reports and statements of government witnesses). Should the grand jury return an indictment, the Court is wary of allowing plaintiff to gain an impermissible advantage in a possible criminal trial by virtue of pre-trial activity in this action.

The Court has considered those factors which might militate against ordering a stay, but, on balance, concludes that defendant's motion should be granted. For example, that the criminal proceeding is in the pre-indictment phase does not dictate that a halt to discovery is inappropriate. *See In Re Application of Eisenberg,* 654 F.2d 1107, 1113 (5th Cir. Unit B Sept. 1981) (pre-litigation discovery request denied where petitioner was subject of pending grand jury investigation). *See also Brock* v. *Tolkow,* 109 F.R.D. 116, 119 n.2 (E.D.N.Y. 1985) (lack of indictment is merely a factor to be considered in deciding motion to stay civil proceedings).

The fact that the government, and not the private party, seeks a stay in the instant case is not necessarily fatal to its application for a stay. *See United States* v. *Phillips,* 580 F. Supp. at 519 (government's motion to halt discovery in state court action granted). It may be true that "the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter." *SEC* v. *Dresser Indus.,* 628 F.2d 1368, 1375–76 (en banc), *cert. denied,* 449 U.S. 993 (1980). But there is no indication that deferral of the civil action is limited to those situations implicating the aforementioned "strongest case." In other words, where the private party institutes the civil litigation, the government is not precluded from successfully moving for a stay. *See also United States* v. *Kordel,* 397 U.S. 1, 12 n.27 (1970) (emphasizing broad discretion of courts to stay civil proceedings at request of prosecutor or criminal defendant).

Finally, there are potential difficulties for plaintiff if the instant action proceeds along with the criminal proceedings. The Court is mindful that parallel civil and criminal actions are Constitutionally sanctioned, and that it is the importer, plaintiff in the instant case, not the government, that seeks to actively continue the civil litigation. Despite this, the Court is concerned with putting principals of the plaintiff to the choice of actively participating in the civil case, to the detriment of their possible criminal defense; or alternatively, as has already happened, refusing to participate in the civil case, thereby injuring its chances for success. *See Brock* v. *Tolkow,* 109 F.R.D. at 120.

CONCLUSION

In light of all the foregoing considerations, and in recognition of the public interest in protecting the commerce of the United States from the possible criminal violation of its import laws,[8] the Court believes that, at least for the present time, the criminal proceedings should be allowed to develop in an unimpeded manner. Accordingly, in exercise of its inherent power to stay proceedings, *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936) (Cardozo, J.), the Court orders that this action be stayed for a period of twenty-one (21) days from the date of this order. In so ordering, the Court recognizes that developments in this action have been forthcoming on almost a daily basis. Therefore, at the expiration of this order, the Court will review the relevant circumstances, including any progress in the criminal proceedings. At that time, the Court will decide whether to allow discovery to resume, and if so, under what limitations.

(Slip Op. 86–138)

KUEHNE & NAGEL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–7–00945

[Record reopened for further proceedings.]

(Decided December 22, 1986)

Busby, Rehm and Leonard (John B. Rehm, Jonathan Hemenway Glazier, and *Munford Page Hall, II)* for plaintiff.

Judge Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice *(John J. Mahon)* for defendant.

OPINION

RESTANI, *Judge:* Plaintiff challenges Customs' classification of certain entries made in 1984 of tobacco, in a form smaller than half leaves, as stemmed filler tobacco under item 170.35 of the Tariff Schedules of the United States (TSUS). Plaintiff claims the appropriate TSUS item is 170.60, scrap tobacco. Alternatively, plaintiff claims classification under item 170.80, tobacco, not specifically provided for.

As always, the starting point as the court's analysis is the statute. At first glance, the merchandise would seem to be stemmed filler tobacco, and item 170.35 would seem to be applicable. The tobacco reached its condition, that is, less than half-leaf, yet suitable for cigarette manufacture, in a purposeful way. Therefore, item 170.60, scrap tobacco, would not seem applicable.

[8] The Court stresses that it expresses no opinion either as to the outcome of the grand jury investigation or as to the merits of plaintiff's claim in the instant litigation.

At trial, however, plaintiff's witnesses explained that historically anything smaller than a half leaf of tobacco was considered to be scrap by the Customs Service. This designation was used originally when tobacco leaves, particularly those intended for cigar filler, were hand stemmed so that half leaves resulted. Such larger pieces were particularly useful in producing "long filler" for cigars and were also considered desirable by cigarette manufacturers. Accidentally broken leaves were considered to be scrap. In addition, a practice developed whereby *purposely* produced pieces, smaller than a half-leaf, also were considered to be scrap by Customs. At one point in time this practice probably applied to inexpensive cigar and chewing tobacco. *See Summaries of Tariff Information* 1020 (1929); 6 *Summaries of Tariff Information* 13 (1948). Eventually, Customs applied the practice to tobacco which was acceptable for cigarette manufacture.[1]

This does not seem consistent with any of the many common meanings of the word "scrap." The court also notes that *Webster's Third New International Dictionary* (1967) contains a definition of "scrap" which reads as follows: "a by-product of the handling of tobacco consisting of loose tangled pieces of leaves, floor sweepings, but no stems."[2] The merchandise at issue is not a "by-product" of tobacco handling. Plaintiff argues that commercial meaning rather than common meaning controls, because Congress specifically adopted Customs practice, which plaintiff contends reflects commercial meaning.[3]

The court necessarily must be concerned about the meaning of words at the time the TSUS was enacted in the nineteen sixties, whether or not that meaning has changed. *Davies Turner & Co.* v. *United States,* 45 CCPA 39, C.A.D. 669 (1957). Therefore, to determine relevant commercial meaning, the court will not focus on trade definitions from the eighties, which reflect both Customs' current views and the domestic industry's hoped-for categorization.

The parties agree that the domestic industry, which presumably knows commercial meaning, has input into the formulation of the standards for government grading of tobacco. In their pre-trial papers the parties also agreed as follows:

> During the period July of 1952 through April of 1963, the Official Standard Grades for Flue-Cured Tobacco of the Agricultural Marketing Service of the Department of Agriculture defined "web scrap" as follows: "Stemmed scrap or seamless scrap which is a by-product from stemming tobacco or handling strips, consisting chiefly of portions of strips; or a lot of tobacco from which the stems have been removed by thrashing or other means which break the web or sides of leaves into small pieces."

[1] Two former Customs employees testified on this point. Neither appeared to have great familiarity with cigarette manufacture, but they testified clearly about the existence of Customs' practice, if not the length of its duration.

[2] The definition is also found in *Webster's Second New International Dictionary* (1954).

[3] The practice was discontinued and there is no challenge to the procedures used in ending the practice.

> That document defined "scrap" as follows: "A by-product from handling tobacco in both the unstemmed and stemmed forms, consisting chiefly of loose, untied, and unstemmed leaves or the web portions of leaves, which accumulate in warehouses, packing and conditioning plants, and stemmeries; or tobacco which has been reduced to scrap by any process."

The second part of the definition of "scrap" seems circular but the definition of "web scrap" (although one could debate what the word "small" means) tends to support plaintiff's view of relevant commercial meaning.

Defendant relies on the definitions of "scrap" and "scrap filler" found in the *Tobacco Dictionary* (R. Jahn 1954) at 144–145:

> **Scrap**
>
> By government definition, a by-product from handling leaves in both the unstemmed and stemmed forms: that is, the leaves, floor sweepings, and all other tobacco materials except stems which accumulate in the manufacturing process.
>
> In the cigar industry scrap is classified as Number One, Number Two, Siftings and Dust. Number One Scrap may be used for short filler, and number two for very inexpensive scrap-filled cigars. Either may be used for blending in smoking or chewing tobaccos. Siftings and Dust are used for fertilizer.
>
> **Scrap Filler**
>
> Any filler made of scrap tobaccos. Most modern scrap filled cigars are of small sizes. The term has come to indicate especially the poorer grades of scrap filler as distinguished from Short Filler.

These definitions do support defendant's view. Furthermore, defendant called two industry witnesses (and one government witness) who testified that in the fifties and sixties the commercial meaning of scrap did not include intentionally cut-up tobacco for cigarette manufacture. Although the possible motives of the witnesses cause the court to weigh their testimony carefully, (all were or are associated with domestic interests), the court is not convinced that the testimony conflicted with any of the essential definitions provided, including those provided by plaintiff.[4] The definition of "web scrap" cited by plaintiff is not entirely clear and it may reflect Customs former practice, more than general commercial meaning. Weighing all of the testimony, it seems persuasive on the crucial points asserted by defendant. The court recognizes the difficulty plaintiff might have in locating industry witnesses in its favor, but the court cannot consider testimony it did not hear.

Plaintiff, nonetheless, asks that the court disregard what the court finds to be both common and commercial meaning, because Congress had another meaning in mind. Plaintiff directs the court's

[4] The defense witnesses' definition of "strip" did disagree with the pre-1963 Department of Agriculture definition. "Strip," however, is not a word used in the TSUS and its meaning is not determinative on the issue of whether tobacco is "scrap."

attention to 3 *Tariff Classification Study* 205 (1960) which reads in part:

> Part 13 of schedule 1 brings together existing tariff provisions applicable to tobacco and tobacco products. The revised schedule clarifies existing tariff language and administrative practice and involves no rate changes.

Apparently, such notes, which are legislative history, have been used to impute to the Congress knowledge of established administrative practice, even if not specifically described in the written legislative history. *See Maiden Lane Trading Corp.* v. *United States,* 68 Cust. Ct. 183, 343 F. Supp. 1366 (1972). The court in *Maiden Lane,* however, viewed such a note as a reference to broad valuation principles and then used the note only to reinforce its conclusion. Here, plaintiff requests the court to use such a note to impute to Congress knowledge of a very specific practice, and a practice which also appears absurd when viewed in the context of common and commercial meaning as well as modern processing.[5] This is a large leap from *Maiden Lane.*[6]

On the other hand, it cannot be disputed reasonably that if a longstanding administrative practice with regard to a law is known to Congress and it reenacts the law without change, the practice is weighty evidence of Congressional intent. *Haig* v. *Agee,* 453 U.S. 280, 301 (1981). Here we have Congress' own statement at the time of enactment of the TSUS that it meant to adopt Customs' administrative practices. What is unknown is how long before 1963 the practice of classifying machine threshold *cigarette* tobacco as "scrap" existed.[7] Because it is not clear that the practice was longstanding or that it was of widespread public knowledge, the court cannot conclude that Congress in 1963 must be considered to have known it.[8]

Plaintiff claims, however, that it can bridge the knowledge gap because of the testimony of the very person who drafted the *Tariff Classification Study.* Such a witness was permitted to testify, subject to the court's ruling on a motion to strike, and he indeed stated that he knew of the practice and meant the term "scrap" to cover purposely cut-up stemmed filler tobacco, such as that at issue. Although, a letter to a committee chair, received prior to enactment, may have relevance in discerning whether Congress was notified of a practice and thus sin discerning legislative intent, *see Rohm and Haas Co.* v. *United States,* 5 CIT 218, 225–26, 568 F. Supp. 751, 757

[5] Stemming and threshing are now one process. Stemmed half leaves for cigarette filler are not the norm. This appears to be true for imported as well as domestic cigarette tobacco, according to the government witness who is responsible for grading imported tobacco currently.

[6] Although the Summaries of Trade and Tariff Information (1967) do support plaintiff's view, the summaries should not be used as a primary source of legislative intent; they simply reflect Customs' practices. *Hawaiian Motor Co.* v. *United States,* 67 CCPA 42, 45–46, 617 F.2d 286, 289 (1980).

[7] Although the TSUS makes no distinction between cigar and cigarette tobaccos, different uses, nonetheless, may impact on classification.

[8] It has been stated that where a statute is ambiguous but has been reenacted without change, longstanding administrative practice will be presumed correct. *Commonwealth Oil Refining Co.* v. *United States,* 60 CCPA 162, 174, C.A.D. 1105 (1973) citing *C.J. Tower & Sons* v. *United States,* 44 CCPA 41, 44, C.A.D. 634 (1957) and *United States* v. *Edward I. Petow & Son,* 34 CCPA 55, 64 C.A.D. 343 (1946). Not only is the acceptance of the practice not without exception, but if taken at face value, the statute involved here is not ambiguous.

(1983), *aff'd* 727 F.2d 1095 (Fed. Cir. 1984), the court finds oral testimony of what someone said to a drafter and what he recollects of it approximately three decades later only minimally probative. It is certainly not enough to convince the court that the common and commercial meaning should be abandoned.[9]

For argument's sake, let us look at what the witness said. He said that he knew about the practice of allowing intentionally cut-up stemmed filler tobacco to be called "scrap," and he meant such tobacco to be included in the TSUS item for "scrap." He did not relate this practice to cigarette manufacture nor did he say that he meant to abandon all ordinary connotations of the word "scrap." If three decades ago, the witness accepted any ordinary meaning of the word "scrap," it is likely that of something less desirable than the norm. Today, cut-up stemmed cigarette filler tobacco is the norm. The testimony indicates that, most likely, it was not so in the late fifties, the likely time of the recounted discussions. At that time the flue-cured industry was switching to machine stemming and threshing. The Burley industry[10] did not arrive at that point until 1973. The tariff schedules are often said to be for the future as well as the present. *Davies, supra.*[11] As long as it is consistent with the intent of the enacting Congress, the words of the TSUS can be adapted to modern technology. *Id.*

The court finds that in any sense of the word, from 1960 to present, the product at issue has not been scrap and that Congress in 1963 would not have intended the 1984 product at issue to be classified as "scrap."

Finally, plaintiff argues that cut-up tobacco is simply not leaf tobacco and cannot be classified under item 170.35, which covers leaf tobacco only.[12] "Leaf tobacco" is defined in 7 C.F.R. § 30.2 (1985) as:

> Tobacco in the forms in which it appears between the time it is cured and stripped from the stalk, or primed and cured, and the time it enters into the different manufacturing processes. The acts of stemming, sweating or fermenting, and conditioning are not regarded as manufacturing processes. Leaf tobacco does not include any manufactured or semimanufactured tobacco, stems which have been removed from leaves, cuttings, clippings, trimmings, shorts, or dust.

Apparently this definition has been in use by the Department of Agriculture since at least 1929. Its implication is that all unmanufactured tobacco is "leaf tobacco," except stems and "by-product." As indicated previously, the tobacco at issue is not a by-prod-

[9] In any case, the court believes that much of this witness' testimony should not be admitted into evidence. The court should not be in the position of calling upon legislators and their staff to explain meaning. Courts interpret statutes by looking at the statute, and the information that was available to all members of Congress when Congress considered the legislation at issue. The secret knowledge or thoughts of drafters are irrelevant. The court finds Customs' former practice erroneous and it will not impute knowledge of it to Congress in 1963, without some specific written legislative history on point.

[10] Burley and flue-cured are types of domestic cigarette filler tobacco. There was little testimony about Maryland tobacco, the other domestic type.

[11] Although this maxim usually is applied to articles not in existence at the time of enactment of the relevant tariff law, it seems appropriate to apply it to a fluid concept such as "scrap," in the context of developing technology.

[12] There are other categories of leaf tobacco, such as "wrapper" tobacco, but they are inapplicable.

uct. It is also not "stems." Thus, the question remaining is whether this product is "manufactured." If it is "manufactured" it belongs in item 170.80, not in item 170.35. The parties are in agreement that this question was not addressed in any detail in the previous proceedings. Taking into consideration the recommendations of counsel, the court will accept further testimony and briefing on this issue, in lieu of remand.

(Slip Op. 86–139)

CHEMICAL PRODUCTS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–9–01321

Before DICARLO, *Judge.*

[Judgment for defendant.]

(Decided December 23, 1986)

Gibson, Dunn & Crutcher (*Joseph H. Price* and *Robert M. Kruger*) for the plaintiff. *Richard K. Willard,* Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(A. David Lafer)* for the defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Chemical Products Corporation (CPC), a domestic producer of barium carbonate, commenced this action challenging a final determination by the United States Department of Commerce, International Trade Administration (Commerce) that barium carbonate from the People's Republic of China (PRC) is being sold in the United States at not less than fair value. *Barium Carbonate from the People's Republic of China,* 49 Fed. Reg. 33,913 (1984).

On September 26, 1986, the Court held that Commerce had not erred in making its determination by (1) using constructed value to determine foreign market value rather than prices from a non-state-controlled economy, (2) using information from the barium chloride industry instead of information from plaintiff's petition under the best information rule upon the refusal of one producing plant to supply requested information, and (3) using the minimum eight percent profitability figure under 19 U.S.C. § 1677b(e)(1)(B)(ii) (1982 & Supp. II 1984). *Chemical Products Corp.* v. *United States,* 10 CIT ——, Slip. Op. 86–97 (1986). The Court, however, remanded the case to Commerce, finding that Commerce's allocation of factors of production to hydrogen sulfide gas (HSG) on a quantity basis was not supported by substantial evidence or in accordance with law since Commerce did not determine the value of HSG, and it would not be reasonable to allocate factors of production on a quantity basis to two products with significantly different values.

On November 10, 1986, defendant filed a motion for vacatur of the remand order and for entry of final judgment on the ground

that Commerce's case analyst determined that no less than fair value margin would exist even if all costs were allocated to the production of barium carbonate. The motion is supported by an affidavit by the case analyst to the effect that recalculations were performed in accordance with the remand order and no less than fair value margin resulted. Defendant further states that based upon the affidavit plaintiff has no objection to the entry of judgment based upon the Court's decision in Slip. Op. 86–97.

Based upon the contents of the affidavit and the positions taken by the parties to this action, the remand order is vacated and the action is dismissed. Judgment shall be entered accordingly. So ordered.

(Slip Op. 86–140)

NISSAN MOTOR CORP. IN U.S.A., NISSAN MOTOR CO., LTD., PLAINTIFFS *v.* UNITED STATES; DEPARTMENT OF COMMERCE, MALCOLM T. BALDRIGE, SECRETARY OF COMMERCE; BRUCE S. SMART, UNDERSECRETARY OF COMMERCE FOR INTERNATIONAL TRADE; PAUL FREEDENBERG, ACTING ASSISTANT SECRETARY OF COMMERCE FOR TRADE ADMINISTRATION; GILBERT B. KAPLAN, DEPUTY ASSISTANT SECRETARY OF COMMERCE FOR IMPORT ADMINISTRATION, DEFENDANTS, AND THE TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 86–11–01392

Before TSOUCALAS, *Judge*

[Defendants' motion to dismiss denied; plaintiffs' motion for preliminary injunction denied.]

(Decided December 23, 1986)

Brownstein, Zeidman and Schomer (Irwin P. Altschuler, David R. Amerine and *Donald S. Stein)* for plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(Platte B. Moring, III)* for defendants.

Stewart and Stewart (Terence P. Stewart) for defendant-intervenor.

MEMORANDUM OPINION AND ORDER

TSOUCALAS, *Judge:* This action is before the Court on plaintiffs' motion for a preliminary injunction to enjoin the International Trade Administration of the Department of Commerce (ITA) from conducting an administrative review and from requiring plaintiffs to respond to questionnaires. Plaintiffs seek to challenge: (1) the authority of the ITA to conduct an administrative review for a period subsequent to the effective date of the ITA's tentative determination to revoke an antidumping finding; and (2) the ITA's ability to require plaintiffs to resubmit information for a period previously reviewed. This Court entertained oral arguments on November 17,

1986 at which time, on consent, The Timken Company was allowed to intervene.

BACKGROUND

On August 18, 1976, the Treasury Department published an antidumping finding covering tapered roller bearings and certain components thereof ("TRBs") from Japan. T.D. 76–227, 41 Fed. Reg. 34974. Plaintiffs are exporter and distributor, respectively, of the merchandise subject to the antidumping finding. On March 28, 1980, after Commerce assumed responsibility for administration of the antidumping laws, the ITA published its notice of intention to conduct § 751 administrative reviews[1] for all outstanding antidumping findings. 45 Fed. Reg. 20511.

Commerce has initiated reviews for the periods June 1974–July 1980; August 1980–July 1981; August 1981–July 1982; August 1982–July 1983; and August 1983–May 14, 1984. On March 9, 1984, Commerce published the final results of the 1974–1980 administrative review, which revealed that plaintiffs had zero dumping margins. Commerce conducted on site verifications for the 1980–1981 period. On May 14, 1984, Commerce published its preliminary results for the 1980–1981 period indicating plaintiffs had zero dumping margins and included a tentative determination to revoke the antidumping finding covering TRBs from Japan exported by plaintiffs. To this date, there has not even been a preliminary determination as to the review periods 1981–1982, 1982–1983, 1983–May 14, 1984. Plaintiffs have requested on at least three occasions that the ITA issue a final decision as to revocation.

On September 16, 1986, the ITA published its intent to conduct an administrative review for the period August 1985-July 1986, acting on a request by defendant-intervenor,[2] to which plaintiffs had objected. Further, the ITA published on October 3, 1986 its notice of intention to "initiate" a review for the period August 1, 1980–May 14, 1984 and has requested "supplemental" information from plaintiffs for that period. Plaintiffs have received questionnaires pertaining to this review period.

Initially, plaintiffs seek to enjoin the ITA from conducting a review for the 1985–1986 period until the ITA completes its review for August 1980–May 14, 1984 and acts on its preliminary determination to revoke. Plaintiffs argue that the ITA has failed to abide by its own regulations and time limits and due to this delay plaintiffs will be forced to suffer. It is alleged that had the ITA acted to revoke the antidumping finding it would not then have the authority to conduct the 1985–1986 review, since these entries would no

[1] The Trade Agreements Act of 1979, Pub.L. 96–39, § 751, 93 Stat. 144, 175, (19 U.S.C. § 1675 (1982)), requires the administering authority to conduct annual administrative reviews of outstanding antidumping findings to determine if there are sales at less than fair value, and determine the amount of the antidumping duty, if any, to be assessed (*but see* n.2 *infra*, as to 1984 amendment).

[2] Section 751 of the 1979 Act was amended by the Trade and Tariff Act of 1984, by requiring annual reviews only when a timely request is received. Pub.L. 98–573, § 611(a)(2)(A), 98 Stat. 2948, 3031 (1984), (19 U.S.C. § 1675(a)(1985)). However, this amendment applies to investigations initiated after October 30, 1984, the effective date of the statute. Pub.L. 98–573 § 626(b)(1), 98 Stat. 3042, (effective date provision).

longer be subject to the antidumping finding. Plaintiffs further challenge whether the ITA can request new supplemental information for periods in which information was already supplied. Defendant opposes the relief sought by plaintiffs, arguing that this Court does not possess jurisdiction over these issues; plaintiffs have failed to state a claim; have failed to exhaust their administrative remedies; and have failed to set forth sufficient facts to satisfy the criteria for the issuance of a preliminary injunction.

DISCUSSION

This action was commenced under 28 U.S.C. § 1581(i). Defendant claims that the Commerce decision to initiate an administrative review is not a final agency action subject to judicial review and Congress did not provide for interlocutory appeals of delays in § 751 reviews. It is defendant's position that plaintiffs cannot seek judicial review until after Commerce completes its § 751 review. The Court is not persuaded by this argument and instead relies on the decision in *UST, Inc., et al.* v. *United States,* 10 CIT ——, Slip Op. 86–100 (Oct. 10, 1986), *appeal filed,* (Fed. Cir. Dec. 9, 1986).

The court in *UST* reasoned that if it were to accept the argument similar to defendant's here, the possibility would exist that the ITA might determine to never complete a § 751 review and thereby escape judicial scrutiny. *Id.* at 8. Section 1581(i) enables this court to entertain actions pertaining to preliminary administrative decisions related to antidumping duty proceedings provided there is no challenge to a determination specified in 19 U.S.C. § 1516a. *Ceramica Regiomontana, S.A.* v. *United States,* 5 CIT 23, 557 F. Supp. 596 (1983). It is clear that this is one type of administrative decision which arises between the final determination (of a dumping finding) and the administrative review of that finding, which cannot be contested via § 1516a. In such circumstances the residual jurisdiction of the court may be invoked. *Royal Business Machines, Inc.* v. *United States* 69 CCPA 61, 73–74, 669 F.2d 692, 701–702 (1981); *accord UST, supra; Ceramica Regiomontana, supra.* The ruling in *The Timken Company* v. *United States,* Court No. 82–6–00890 (October 10, 1986) that the ITS's initiation of a new investigation based on the filing of a new petition was in interlocutory order not subject to judicial review is distinguishable. That action was brought under 28 U.S.C. § 1581(c) not § 1581(i), to contest a new investigation, not inordinate delay in a § 751 review.

Similarly, while defendant claims that plaintiffs must exhaust their administrative remedies, more than two years have elapsed since the tentative determination to revoke as to plaintiffs without any further final action by the ITA. Plaintiffs have on several occasions requested Commerce to complete its administrative reviews to no avail, and sometimes without even the benefit of a response. This court shall where appropriate require the exhaustion of administrative remedies. 28 U.S.C. § 2637(d) (1982). Therefore, failure

to exhaust administrative remedies in challenging a § 751 review does not bar this Court's jurisdiction. *See Philipp Bros., Inc.* v. *United States,* 10 CIT ——, 630 F. Supp. 1317, 1320 (1986), *appeal dismissed,* No. 86–1122 (Fed. Cir. July 18, 1986). *See also Manufacture de Machines du Haut-Rhin* v. *von Raab,* 6 CIT 60, 65, 569 F. Supp. 877, 882–883 (1983).

In thus reaching the issue as to whether a preliminary injunction should issue, plaintiff must clearly demonstrate the existence of the following four factors: (1) the threat of immediate irreparable harm; (2) the likelihood of success on the merits; (3) whether the public interest is better served by issuing rather than by denying the injunction; and (4) whether the balance of hardships to the parties favors the issuance of an injunction. *Zenith Radio Corp.* v. *United States,* 710 F.2d 806, 809 (Fed. Cir. 1983); *S.J. Stile Associates, Ltd.* v. *Snyder,* 68 CCAP 27, 30, 646 F.2d 522, 525 (1981). In a flexible balancing of hardships approach the showing of ultimate success and the severity of injury are inversely proportional. *American Air Parcel Forwarding Co.* v. *United States,* 1 CIT 293, 298, 515 F. Supp. 47, 52 (1981).

Plaintiffs claim that they will be irreparably harmed if forced to complete the questionnaires required by the ITA for the periods 1985–1986, and the supplemental information for 1980–1984. In the two affidavits submitted by plaintiffs it is alleged that it will require approximately 2200 man hours to supply the information requested. Plaintiffs further claim that due to the restructured format of the questionnaires requiring information on a sale by sale basis, plaintiffs may not be able to compile such information based on its method of record keeping, since this type of information has never before been requested. It is plaintiffs' position that if the ITA decides to issue a final determination to revoke as to plaintiffs then these responses will be totally unwarranted. While this Court can appreciate that plaintiffs seek to avoid the expenditure of time and resources which may ultimately prove unnecessary, this cannot be equated with the threat of immediate and irreparable harm.

The mere showing that costs will be incurred in compiling the information does not satisfy plaintiffs' burden. *UST,* Slip Op. 86–100 at 9. The financial burden of completing the questionnaires is not irreparable harm even if resources are diverted from business activity for this purpose. *Hyundai Pipe Co., et. al.* v. *United States,* 10 CIT ——, Slip Op. 86–114 (Nov. 5, 1986). "The costs borne by the companies in utilizing their own employees is linked directly to the agency action in issuing the questionnaires and consequently is a normal litigation expense." *Id.* at 9. Even unrecoupable litigation costs do not constitute irreparable injury, *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1973), nor do the expense and disruption associated with delay in administrative proceedings. *FTC* v. *Standard Oil,* 449 U.S. 232, 244 (1980). Furthermore, while the revised questionnaire format may produce difficulties in plain-

tiffs' ability to respond, this Court cannot prevent Commerce from employing this new methodology when there has been no showing that it is an unreasonable means to obtain the necessary data. *See, e.g., UST,* Slip. Op. 86–100 at 10.

Similarly, plaintiffs' showing of likelihood of success on the merits falls short of its required burden. Relevant to an analysis as to whether the ITA can obtain information for a period subsequent to May 14, 1984 (the date of the tentative determination to revoke), is the decision in *Freeport Minerals* v. *United States,* 776 F.2d 1029 (Fed. Cir. 1985). It was held that it was error for the ITA not to conduct a § 751 review for the "gap period", the time between the period that was actually reviewed and the tentative determination to revoke. The court in relying on the legislative history of § 751 (19 U.S.C. § 1675(a)) stated that Commerce should always use the most current information available. 776 F.2d at 1032. Since there had been no review within a year of the tentative determination to revoke, this precluded petitioner's access to current review findings in contravention of Congressional intent. While the court in *Freeport* required the ITA to conduct a review during this gap period, the decision has been cited as requiring the most up to date information available be reviewed before a final revocation may be effected. *UST, supra* at 10. The ITA has an obligation to obtain updated information. *The Timken Co.* v. *United States,* 10 CIT ——, 630 F. Supp. 1327, 1333 (1986). Regardless of whether or not a request was filed for an administrative review for 1985–1986, it is the ITA's responsibility to properly implement the antidumping laws (*see* n.2, *supra*).

Concededly, the ITA has clearly exceeded the time limits imposed, which provide that within one year of initiation of the review, the Secretary will issue final results. 19 U.S.C. § 1675(a); 19 C.F.R. 353.53a(b)(7). Furthermore, as soon as possible after the preliminary determination to revoke is published, the Secretary shall determine whether final revocation is warranted. 19 C.F.R. § 353.54(f). If it is in fact warranted, the revocation will be effective as of the date on which the tentative determination was published (May 14, 1984).[3] However, while the ITA has failed to timely complete its reviews, it is not precluded from obtaining current data upon which to base its final decision. It has been held that the schedule for completion of § 751 reviews is directory and not mandatory. *Philipp Bros., Inc.* v. *United States,* 10 CIT ——, 630 F. Supp. at 1323–1324 (no restraint or adverse consequences are affirmatively imposed for the delay), *appeal dismissed,* No. 86–1122 (Fed. Cir. July 18, 1986). Therefore, the appropriate action by plaintiff is a suit to enforce the statutory deadlines. *American Permac* v. *United States,* 10 CIT ——, Slip. Op. 86–83 at 13 (August 12, 1986). None-

[3] The Secretary may revoke an antidumping finding upon an application for revocation demonstrating that sales are no longer made at LTFV for two years following the antidumping finding or order. Similarly, the Secretary on his own initiative may revoke an antidumping finding after three years if he is satisfied there is no likelihood of resumption of sales at LTFV, or sales at LTFV have been eliminated, or changed circumstances exist. § 353.54(b),(c).

theless, in such an action brought in *UST,* the court deferred issuance of the writ of mandamus pending timely compliance with a proposed schedule for completion of the reviews. Slip. Op. 86–100 at 12–13. Such a schedule has been submitted in this action and the Court intends to have the ITA abide by these deadlines.

Plaintiffs have cited *Matsushita, et. al.* v. *United States,* 10 CIT ——, Slip Op. 86–84 (August 12, 1986), *appeal docketed,* No. 86–1678 (Fed. Cir. Sept. 15, 1986), where the court enjoined the ITA from conducting any further reviews or revising its request format until it acted on the preliminary determination to revoke. However, the court did not use the traditional four prong analysis and discuss whether, in light of *Freeport Minerals,* plaintiff would be successful as to requiring the ITA to determine final revocation without the benefit of current data.

Plaintiffs further contest the ITA's request for supplemental information for the period 1980–1984 in view of the fact that there was already a review conducted, and where for the 1980–1981 period there were on site verifications, and a preliminary determination of no dumping. Apparently the ITA has issued new questionnaires for this period to conform with the holding in *The Timken Company,* 10 CIT ——, 630 F. Supp. 1327, which involved the ITA's decision to revoke an antidumping finding as to TRBs, the product here in issue. The court found that the methodology employed by the ITA in determining that there were no sales at LTFV was fundamentally flawed in that it had allowed the foreign manufacturers to chose which merchandise was similar to that under review. The ITA had abused its authority in failing to collect adequate home market sales data to make its own determination as to what models were the most similar to those sold in the United States. 630 F. Supp. at 1338. Defendant-intervenor takes the position that the same erroneous methodology was employed by the ITA in conducting the initial administrative reviews of plaintiffs' TRBs.

Plaintiffs respond that in the intervenor's petition for the antidumping investigation for 1985–1986, plaintiffs are not even identified on the list of known importers and manufacturers of TRBs, which accompanied that petition. However, at issue is a § 751 review of T.D. 76–227; the new investigation is irrelevant since Commerce specifically stated that it does not cover products subject to the original outstanding antidumping finding in T.D. 76–227. *See* 51 Fed. Reg. 33286 (September 19, 1986). Plaintiffs further claim that they have always provided complete sales listings of all sales in the United States and Japan and that intervenor has never alleged otherwise. Finally, plaintiffs attempt to demonstrate that the ITA is merely requesting resubmission of prior information in a new format rather than new supplemental information.

If the ITA's previous review was tainted due to a manifest error then it may amend its determination. *The Timken Company,* 10 CIT ——, 630 F. Supp. at 1332; *Melamine Chemicals.* v. *United States,* 8

CIT 105, 106, 592 F. Supp. 1338, 1340 (1984). This principle certainly seems applicable to a situation where no final determination has yet been issued. If in fact the administrative review for 1980–1984 was based on an incorrect analysis as in *Timken,* and these revised questionnaires will achieve remediation, this Court should not interefere. "The public interest is served when agencies act in conformity with a statutory mandate designed to achieve goals inuring to the public benefit". *Hyundai,* 10 CIT ——, Slip. Op. 86–114 at 11 (November 5, 1986). There has not been an adequate showing that these questionnaires are unreasonable, unwarranted, or merely a form of harassment. While the ITA cannot be precluded from obtaining this information, it must also be expected to fulfill its obligations in a timely manner. Therefore, the Court incorporates as part of this decision the proposed schedule submitted by the ITA: preliminary results for the review periods 1981–1982; 1982–1983; and 1983–May 14, 1984, to be issued by May 7, 1987; final results as well as a final determination on revocation to be issued by September 30, 1987. The Court directs the ITA, once in receipt of plaintiffs responses, to complete the reviews within a reasonable time of those deadlines.

CONCLUSION

This Court finds that plaintiffs have not satisfied their burden in demonstrating that irreparable harm will result in the absence of the preliminary injunction, and have failed to adequately show their likelihood of success on the merits. Therefore, plaintiffs' motion is denied. Further, for the above mentioned reasons, defendant's motion to dismiss is also denied. SO ORDERED.

(Slip Op. 86–141)

INTERIOR TRADE, INC. AND PETROBRAS COMERCIO INTERNATIONAL S.A. INTERBRAS, PLAINTIFFS *v.* UNITED STATES AND MALCOLM BALDRIGE, SECRETARY OF COMMERCE, DEFENDANTS

Court No. 86–04–00510

OPINION AND ORDER

[Motion to dismiss complaint denied.]

(Dated December 23, 1986)

Rogers & Wells (*Eugene T. Rossides* and *Robert E. Ruggeri*) for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Elizabeth C. Seastrum*) for the defendants; *Andrea E. Migdal,* U.S. Department of Commerce, of counsel.

AQUILINO, *Judge:* The government urges dismissal of this action brought pursuant to section 623 of the Trade and Tariff Act of 1984, 19 U.S.C. § 1516a(a)(3), primarily on the Department of Commerce's

interpretation of the legislative intent underlying enactment of that statute. Though ably presented, the motion must be denied, as was also the case in *Canadian Meat Council* v. *United States*, 10 CIT ——, 644 F. Supp. 1125 (1986).

BACKGROUND

In 1985, the Ad Hoc Committee of Domestic Fuel Ethanol Producers filed petitions with the International Trade Administration ("ITA") and the International Trade Commission ("ITC") alleging that fuel ethanol imported from Brazil was being sold in the United States at less than fair value and that such imports were causing or threatening to cause material injury to the domestic industry. The domestic procedures thereafter requested that the ITA also investigate trading-company dumping upon an allegation that middlemen were selling the ethanol at prices below the cost of acquisition, exportation and marketing. The ITA initiated such an investigation of Petrobras Comercio International S.A. Interbras ("Interbras"), one of the two plaintiffs herein.[1]

The ITA made a preliminary determination of sales at less than fair value and set a preliminary dumping margin for Interbras of 119.02% *ad valorem*. *See* 50 Fed. Reg. 38,871 (Sept. 25, 1985). In its final determination, the agency found Interbras sales at less than acquisition cost and prescribed a dumping margin of 101.12% *ad valorem*. *See* 51 Fed. Reg. 5,572, 5,573 and 5,579 (Feb. 14, 1986).

No antidumping-duty order has been published, however, since the ITC determined that the domestic producers were not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Brazil of certain ethyl alcohol.[2]

The plaintiffs commenced this action, alleging jurisdiction under 28 U.S.C. § 1581(c) ("[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930"). The defendant United States has interposed a motion to dismiss on the ground of lack of subject-matter jurisdiction. The primary point pressed, as indicated above, is statutory, but the motion papers state that, if the court overrules that point, then deciding the merits of this action would require rendering an advisory opinion prohibited by Article III of the Constitution. *See, e.g.*, Defendant's Memorandum, pp. 13–14.

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[1] Paragraph 3 of the complaint alleges their respective roles in the marketing of ethanol to be as follows:

> • • • Internor, a New York corporation, is the U.S. subsidiary of Interbras which is wholly owned by Petrobras, a Brazilian corporation. Internor is a U.S. importer, and Interbras a Brazilian exporter, of the fuel ethanol from Brazil under investigation in this matter. Neither of the Plaintiffs, nor Petrobras, manufactures fuel ethanol. Interbras and Petrobras purchase ethanol in Brazil for export and domestic sales, respectively.

[2] *See Certain Ethyl Alcohol from Brazil*, USITC Pub. 1818 at 1 (March 1986); 51 Fed. Reg. 9,538 (March 19, 1986). This decision is being challenged by the domestic producers in *Ad Hoc Committee of Domestic Fuel Ethanol Procedures* v. *United States*, Court No. 86-03-00376.

DISCUSSION

I

Section 1516a(a)(2) of Title 19, U.S.C. has provided for commencement of actions in this Court of International Trade within 30 days of publication in the Federal Register of antidumping-duty orders to review final affirmative ITA determinations underlying such orders. In 1984, Congress enacted the Trade and Tariff Act, section 623 of which was entitled "Elimination of Interlocutory Appeals". Subparagraph (a)(4) of this section stated:

> Redesignate paragraph (3) [of 19 U.S.C. § 1516a(a) (1979)] as paragraph (4) and after paragraph (2) insert the following:
> "(3) EXCEPTION.—Notwithstanding the limitation imposed by paragraph (2)(A)(ii) of this subsection, a final affirmative determination by the administering authority under section 705 or 735 of this Act may be contested by commencing an action, in accordance with the provisions of paragraph (2)(A), within thirty days after the date of publication in the Federal Register of a final negative determination by the Commission under section 705 or 735 of this Act.".
> Defendant's counsel admit, as they must, that:
> On its face this provision appears to grant Internor the right to seek judicial review of the ITA final affirmative antidumping determination, even though the ITC made a negative injury determination and, as a consequence, no antidumping duty order was published. Defendant's Memorandum, pp. 3–4.

Nevertheless, they contend that Congress made a mistake. *Id.* at 11. That is, section 623(a)(4) of H.R. 3398, 98th Cong., 2d Sess. (1984) conditioned the above-quoted exception on a final negative determination by the Commission under section 705 or 735 "which is predicated upon the size of either the dumping margin or net subsidy determined to exist." Counsel describe the deletion of this condition in the act, as passed, in the following manner:

> The language limiting the application of section 516a(a)(3) to a negative ITC determination using margins analysis survived through the report of the Conference Committee on the Trade and Tariff Act of 1984, dated October 5, 1984. *See* H. Conf. Rep. No. 98–1156, 98th Cong. 2d Sess. 92, 179 * * *. At the eleventh hour, however, the "exception" as finally enrolled in section 516a(a)(3) was shorn of the clause limiting its application to cases where the ITC used margins analysis. A resolution by Congressman Rostenkowski accomplished the ministerial act of eliminating the limitation clause, six days after the Conference Committee report cited above. 130 Cong. Rec. H12213 (daily ed. October 11, 1984). Congressman Rostenkowski's resolution was part of a last-minute concurrent resolution submitted to correct technical errors in H.R. 3398, the Trade and Tariff Act of 1984. *Id.* Unfortunately, in its effect, this "correction" was not at all technical. Defendant's Memorandum, pp. 8–9.

And they would therefore have the court draw the following conclusion:

> * * * Most probably Congress intended to delete the "exception" altogether. Since it failed to do so, in the last minute of legislative business, a common sense interpretation of the provision requires that it be limited to the few instances in which the ITC has used margins analysis in arriving at its determination. Since that is not the case here, Internor possesses no right to obtain judicial review under this provision. *Id.* at 13.

Whatever the degree of perspicacity or logic of their thesis, this court must nevertheless apply the statute that Congress enacted, and the provision passed in the 1984 act was within the scope of the proposed modifications considered by Congress.[3] It is an elementary principle of statutory construction that " '[t]he starting point in every case involving construction of a statute is the language itself' ". *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976) (quoting *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J. concurring)). *See also American Lamb Co.* v. *United States,* 785 F.2d 994, 1002 (Fed. Cir. 1986) ("[w]e begin with the best source of congressional intent, the statute"). As the court recently reiterated in *Al Tech Specialty Steel Corp.* v. *United States,* 10 CIT——, Slip Op. 86–124 at 7 (Dec. 1, 1986), "[i]t is an established principle of jurisprudence that where a statute's meaning is clear, that meaning will be controlling, even if relevant legislative history suggests another plausible interpretation".

The text of the provision at issue is not ambiguous, and this court is not at liberty to interpret that language as if it were otherwise. *See Canadian Meat Council* v. *United States,* 10 CIT at ——, 644 F. Supp. at 1127. Of course, section 623 of the 1984 act was entitled as pointed out above, page 4, but, as the Supreme Court stated in *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.,* 331 U.S. 519, 528–29 (1947):

> * * * [T]he title of a statute and the heading of a section cannot limit the plain meaning of the text. * * * For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain. [citations omitted]

II

Essentially, defendant's contention of unconstitutionality addresses the ripeness of this action. The purpose of the ripeness doctrine

[3] For example, a proposal made on behalf of a number of domestic industries would have made reviewable

> [a]ny final negative or final affirmative determination by the Secretary, the administering authority, or the Commission under section 303, 705, or 735 of this Act, whether or not the other agency determination (administering authority or Commission) is affirmative or negative.

Options to Improve the Trade Remedy Laws, Hearings before the Subcomm. on Trade of the House Comm. on Ways and Means, 98th Cong., 1st Sess. 795 (1983).

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. *Gardner,* 387 U.S. 136, 148–49 (1967). The test for determining ripeness requires courts "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration". *Id.* at 149.

In *Canadian Meat Council* v. *United States, supra,* the claim of unconstitutionality was rejected by the court, which concluded that a "final affirmative subsidy determination is an action from which legal consequences flow, having a substantial impact on the rights of the parties". 10 CIT at ——, 644 F. Supp. at 1128 (citation omitted). Therefore, "[i]t is within the Court's power under Article III of the Constitution" to hear such cases "as required by section 1516a(a)(3)". *Id.* This court concurs.

The government is concerned that "a decision by this Court on plaintiffs' challenge to the ITA's affirmative determination could well prove advisory * * * if the negative ITC determination, which is challenged in a separate law suit in the Court, is sustained". Defendant's Memorandum, p. 14. But even if this were true, the court would not have to stray into a prediction of future events[4] since the appeal of the ITC determination has been assigned to this same judge.

This type of action is analogous to a protective cross-appeal filed by a defendant that has prevailed on the issue of damages but has lost on liability. The defendant can cross-appeal the liability judgment if the plaintiff appeals on damages. *See, e.g., Kapp* v. *National Football League,* 586 F.2d 644 (9th Cir. 1978) (*en banc*), *cert. denied,* 441 U.S. 907 (1979). In *Kapp,* the cross-appeal was found to be moot, but only after the judgment on damages had been upheld. *See* 586 F.2d at 650.

In *Canadian Meat Council,* Commerce attempted to distinguish *Kapp* since the defendant would have lost its right to contest the liability issue if it had not filed a cross-appeal. That is, had the appellate court reversed on damages, the defendant would have had no redress. The argument was that the "statutory frame work provides * * * an explicit, unequivocal right to seek judicial review of the ITA affirmative determination if and when the ITC negative injury determination is reversed".[5]

This distinction, however, does not affect ripeness. The plaintiffs indeed have a stake in the outcome of this action to review the less-than-fair-value ITA determination, regardless of whether or not an antidumping-duty order ever issues. Dumping has been described as

[4] *See American Spring Wire Corp.* v. *United States,* 6 CIT 122, 124, 569 F. Supp. 73, 75 (1983).

[5] Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, pp. 15–16 (filed on March 3, 1986 in *Canadian Meat Council* v. *United States,* Court No. 85–09–01168).

one "of the most pernicious practices which distort international trade to the disadvantage of United States commerce",[6] and a finding thereof could be used to the detriment of the plaintiffs if a future investigation were initiated and "critical circumstances" alleged. Under the law, critical circumstances can be found where an importer "knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value." 19 U.S.C. § 1673d(a)(3)(A)(ii).

While the question of a future investigation is, of course, speculative, Article III of the Constitution permits suits such as this one to proceed. For example, the Court in *Sibron* v. *New York*, 392 U.S. 40 (1968), held that a convict who had served fully his sentence is not barred from appealing the conviction as the

> conviction may be used to impeach his character should he choose to put it in issue at any future criminal trial * * * and that it must be submitted to a trial judge for his consideration in sentencing should Sibron again be convicted of a crime. 392 U.S. at 55–56.

Though *Sibron* was a criminal case involving mootness, the Court's rationale that "it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time"[7] applies equally here. In *Straus Communications, Inc.* v. *F.C.C.*, 530 F.2d 1001 (D.C. Cir. 1976), the court found that a letter from the Federal Communications Commission indicating a violation by a radio station was reviewable as

> in all likelihood * * * future violations by this station would stand to suffer harsher treatment than similar violations by other stations. This probability is enough to establish a present effect sufficient to make the letter a final order ripe for review on the petition of the station. *Id.* at 1006–07 (footnote omitted).

Furthermore, it is well settled that "agency action may be reviewable even though it is *never* to have any formal, legal effect". *Continental Air Lines, Inc.* v. *C.A.B.*, 522 F.2d 107, 124 (D.C. Cir. 1975) (*en banc*) (emphasis in original). In *Air Line Pilots' Ass'n Int'l* v. *Department of Transp., Federal Aviation Admin.*, 446 F.2d 236 (5th Cir. 1971), the court found an FAA determination that a proposed structure would present "no hazard" to air navigation to be ripe for review. The court rejected the FAA's argument

> that its "no hazard" determination neither imposes an obligation, denies a right, nor fixes a legal relationship * * *. The determination merely declares that the proposed structure will, or will not, be a hazard to air navigation; and regardless of what determination the FAA makes, the proponent of the structure may proceed in his construction with impunity. The

[6] S. Rep. No. 249, 96th Cong., 2d Sess. 37 (1979).
[7] 392 U.S. at 57.

> only effect of the determination * * * is its power of "moral suasion." 446 F.2d at 240.

The court found that "it takes little knowledge of the goings-on about us to be aware that 'moral suasion' is a considerably potent force in our society". *Id.* at 241. The court continued that

> should they seek to arouse public reaction against the structures on grounds that the structures would be a "hazard" to air navigation, the proponents could point to an official determination that the structures are "not hazards". *Id.*

This action is somewhat comparable, as the plaintiffs claim to fear that the ITA determination will affect their credibility. *See* Plaintiffs' Response, p. 21. The government reply that "Internor may just as well promote the ITC *negative* injury determination as proving its innocence of injurious dumping, as the domestic ethanol producers may tout the ITA affirmative determination as proof of their claims"[8] misses the point that the ITC determination does not deny the existence of less-than-fair-value sales. Additionally, ITC Commissioner Eckes dissented, stating that

> it is arguable that some members of the majority may not have applied properly the statute, legislative history, and existing case law to the facts at hand. Indeed, some seem determined to revise the statute under the thin veil of administrative discretion. USITC Pub. 1818 at 41.

Thus, promotion of the ITC position might not repair the harm that the ITA determination allegedly is causing the plaintiffs.

Having evaluated plaintiffs' claim of harm under the *Abbott Laboratories* test, this court concludes that this action is ripe. The interest in delaying review of the ITA's final determination until issuance of any antidumping-duty order does not outweigh the adverse impact of that final determination on the plaintiffs. *Cf. Continental Air Lines, Inc.* v. *C.A.B.*, 522 F.2d at 125. And judicial resources will not be wasted due to the assignment of the related ITC action to the undersigned.

In view of the foregoing, defendant's motion to dismiss must be denied.

So ORDERED.

[8] Defendant's Reply, p. 14 (emphasis in original).

(Slip Op. 86–142)

BROOKSIDE VENEERS, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–9–01305

Before CARMAN, *Judge.*

MEMORANDUM OPINION AND ORDER

[Judgment for Plaintiff.]

(Decided December 30, 1986)

Stedina and Deem (*Charles P. Deem*) for the plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, (*Saul Davis*) Department of Justice, Civil Division, Commercial Litigation Branch for the defendant.

CARMAN, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of certain wood products invoiced as manmade veneers and marketed as Brookline veneers under item 207.00 of the Tariff Schedules of the United States (TSUS) as articles of wood, not specially provided for.

The merchandise in question was manufactured in and exported from Italy to New York in 1979, 1980, and 1981. It consists of veneers sliced from a block of natural wood veneers which are dyed,[1] glued, bonded, and cold pressed together. The formation and slicing of the block allows for a particular color, grain, and pattern[2] of the final product depending upon the customer's requirements. The merchandise is used in the same manner and for the same purposes as natural veneers and some plastics materials.[3] It was not known in commerce at the time of enactment of the TSUS.

The imported articles were assessed with duty under TSUS Schedule 2, Part 3 in the following manner:

		1979	*1980*	*1981*
207.00	Articles not specially provided for, of wood	8%	7.6%	7.3%

The plaintiff contends that the merchandise should have been classified and assessed with duty in accordance with item 240.03 and definitions therein:

Part 3 headnotes:

1. For the purposes of this part, the following terms have the meanings hereby assigned to them:

(a) *Wood veneers:* Wood sheets or strips, regardless of thickness, quality or intended use, produced by the slicing or rotary cutting of logs or flitches; and wood sheets, not

[1] Plaintiff utilizes an infinite variety of colors, some of which do not appear in any known natural tree, log, or flitch from which natural wood veneers are sliced.

[2] Depending upon the angle at which the block is sliced, various patterns are created.

[3] The merchandise is used in the construction and manufacture of buildings, furniture, fittings, doors, window frames, wall panelling, musical instruments, audio speakers, boats, tennis rackets, etc. It is also used in the manufacture of products commonly and commercially known as wood veneer panels.

over ¼ inch in thickness, produced by sawing and of a type used to overlay inferior material;

* * * * * * *

Wood veneers, whether or not face finished, including wood veneers reinforced or backed with paper, cloth, or other flexible material:

Not reinforced or backed:

* * * * * * *

		1979	*1980*	*1981*
240.03	Other	2%	2%/Free	Free[4]

The question presented for decision is whether the imported materials were properly classified by Customs as articles of wood not specially provided for. The Court disagrees with the classification by Customs and holds that plaintiff's merchandise should have been classified as wood veneers.

Plaintiff's Contentions

Plaintiff contends that Brookline veneers, in accordance with usage and common and commercial meaning should be classified as wood veneers. Plaintiff urges the source of veneers has never been an important component in the classification of veneers. Assuming source an important factor, however, plaintiff disagrees with the meaning ascribed to the terms log and flitch by the defendant in the tariff provision for wood veneers. More specifically, plaintiff contends that the words log and flitch lack sufficient precision to enable the exclusion from classification as wood veneers of plaintiff's merchandise. Plaintiff asserts the defendant has erroneously interpreted the tariff provision to require the words "only natural" before "log or flitch" thus compelling the conclusion that plaintiff's reconstructed Brookline veneers are not wood veneers. Plaintiff further argues the terms log and flitch are capable of including articles made by artificial means.

Defendant's Contentions

In opposition, defendant argues Congress explicitly provided that the use of the product is irrelevant in the determination of whether or not an article is classifiable as wood veneer. Defendant further contends that common and commercial meaning are irrelevant, since by defining the term wood veneers and not altering this definition in a subsequent amendment, Congress evinced an intent to limit the scope of the term to its literal elements. One of these elements, defendant maintains, is source-log or flitch. Defendant asserts that the block from which Brookline veneers are sliced is nei-

[4] By an amendment to Schedule 2, Part 3, the duty on hardwood veneers, items 240.00-240.06, was eliminated. *See* Act of Dec. 28, 1980, Pub. L. No. 96-609, § 116, 94 Stat. 3555, 3559 (codified at 19 U.S.C. § 1202). The purpose of the amendment was to "enable U.S. manufacturers of plywood, who rely on imported logs and veneers for the manufacture of their product to obtain veneers at a lower cost and thus compete more effectively with imported plywood." S. REP. NO. 999, 96th Cong., 2d Sess. 19 (1980).

ther a log nor a flitch as these terms are defined and understood; and therefore, plaintiff's merchandise cannot be classified as wood veneers.

DISCUSSION

The rules of statutory construction provide that a statute must be construed in accordance with legislative intent. If this intent is clear from the language of the statute, no further inquiry is needed. *United States* v. *Esso Standard Oil Co.*, 42 CCPA 144, 151 C.A.D. 587 (1955). If the intent is not apparent, the Court will consider legislative history *United States* v. *Kung Chen Fur Corporation*, 38 CCPA 107, 117, C.A.D. 447 (1951); long-established administrative practice *Commonwealth Oil Refining Co.* v. *United States*, 60 CCPA 162, 174, C.A.D. 1105, 480 F.2d 1352, 1361 (1973); judicial decisions on the issue at or closely following the time of enactment *Merry Mary Fabrics, Inc.* v. *United States*, 1 CIT 13 (1980); the commercial or common meanings of the terms in the statute when the statute is enacted *Armand Schwab & Co., Inc.* v. *United States*, 32 CCPA 129, 132 C.A.D. 296 (1945). It is also a fundamental rule that a Customs classification, once determined, is entitled to a presumption of correctness. *Ameliotex, Inc.* v. *United States*, 426 F. Supp. 556, 563 (1976), *aff'd*, 65 CCPA 22, C.A.D. 1200, 565 F.2d 674 (1977).

At issue is whether Congress manifested an intent to limit the definition of wood veneers to articles derived from logs or flitches; and if so, whether such logs or flitches must exist in their natural state. The definition of wood veneers as previously stated provides as follows:

> Wood sheets or strips, regardless of thickness, quality or intended use, produced by the slicing or rotary cutting of logs or flitches; and wood sheets, not over ¼ inch in thickness, produced by sawing and of a type used to overlay inferior material[.]

TSUS Schedule 2, Part 3, headnote 1(a).

Plaintiff suggests that prior to the enactment of the TSUS source was not a significant factor in the classification of veneers. Defendant contends that references were not made to source since logs and flitches were universally recognized as the sources for wood veneers. Veneer has been defined as:

> **1a:** a thin sheet of wood cut or sawed from a *log* and adapted for adherence to a smooth surface (as of wood) * * * as (1): a layer of wood of superior value or excellent grain for overlaying an inferior wood (as in cabinetmaking) usu. by gluing (2): any one of the thin layers that are glued or otherwise bonded together to form plywood **b:** material (as sheets of wood) for veneering; *sometimes:* thin highly glazed colored paperboard for such use **2:** something felt to resemble or functioning in the manner of a veneer of wood esp. in forming a superficial layer: as **a:** a superficial or meretricious show: GLOSS **b:** a protective or ornamen-

> tal facing (as of brick or stone) for a wall c(1): a thin but extensive covering of an older geologic formation or surface * * *. [Emphasis added.]

Webster's Third New International Dictionary (1968). The leading authoritative lexicographic source in the industry as it appeared in the edition that immediately preceded the enactment of the TSUS also provides a definition:

> *Veneer.*—A thin layer or sheet of wood cut on a veneer machine.
> *Rotary-cut veneer.*—Veneer cut in a lathe which rotates a *log or bolt,* chucked in the center, against a knife.
> *Sawed veneer.*—Veneer produced by sawing.
> *Slicing veneer.*—Veneer that is sliced off a *log, bolt, or flitch* with a knife.
> [Emphasis added.]

Forest Products Laboratory, Forest Service, U.S. Dep't of Agriculture, Agriculture Handbook No. 72, Wood Handbook 490 (1955) (hereinafter cited as Wood Handbook).

Despite plaintiff's contention, the Court is guided by the plain language of the above definitions and the TSUS which explicitly refer to source. The language of the TSUS expressly provides that at least with regard to slicing and rotary cutting, the material from which the veneers are derived must be a log or flitch. Presumably, reference was made to source since Congress understood wood veneers to mean wood veneers derived from wood or wood products rather than some other material. Absent strong evidence to the contrary, we are simply unable to conclude that the words log and flitch are superfluous. *See Ameliotex,* 65 CCPA at 25, 565 F.2d at 677 ("Congress is presumed not to have used superfluous words in a statute."). In accordance with this language, we are also satisfied that Congress did not intend the usage of the article to be considered in ascertaining whether the merchandise is classifiable as wood veneers.

It does not necessarily follow, however, that Congress by enacting Pub. L. 96–609,[5] which eliminated the duty on hardwood veneers, intended to exclude articles such as plaintiff's merchandise from the scope of the wood veneer provision. There is nothing in the record to suggest that Congress was even remotely aware and thus approved of Customs' classification of the imported articles. No plausible justification for the distinction, moreover, is apparent.

The analysis therefore focuses upon and underscores the importance of the meaning ascribed to the terms log and flitch in the definition of wood veneers. The issue is whether the block from which Brookline veneers are sliced, in its artificial state, can be treated as a log or flitch consonant with the statutory definition of wood ve-

[5] *See supra* note 4.

neers. In defining wood veneers, Congress has not provided definitions for either log or flitch.

In the absence of definition, Congress is presumed to attach the common meaning of a term in a tariff provision. *Schott Optical Glass, Inc.* v. *United States,* 67 CCPA 32, 34, C.A.D. 1239, 612 F.2d 1283, 1285 (1979). To interpret the term, the Court may rely upon its own understanding of the term and may refer to the works of standard lexicographers, scientific authorities, and the testimony of witnesses. *United States* v. *Standard Surplus Sales, Inc.,* 69 CCPA 34, 37–8, 667 F.2d 1011, 1013 (1981). Of additional import is TSUS General Rule of Interpretation 10(c) which provides that an imported article described in two or more provisions is classifiable under the provision which more specifically describes it, bearing in mind that tariff schedules are drafted for the future as well as the present and embrace terms not known at the time of enactment. *Standard Surplus Sales,* 69 CCPA at 38, 667 F.2d at 1014.

Plaintiff contends that the common and commercial understanding of the terms log and flitch are not precise; and therefore, it is inappropriate to exclude plaintiff's block or reconstructed logs from that meaning. Plaintiff offers evidence from an article written by its President, Arne Thomsson, to support this contention. In discussing the uses of a lathe and slicer to produce wood veneers, Mr. Thomsson states that a log is processed by steaming, cooking, and drying before used to produce ordinary wood veneers.

Defendant directs the Court to consider the definitions of log and flitch as found in the Wood Handbook. The Handbook defines log and flitch as follows:

> *Log.*—A section of the trunk of a tree in suitable length for sawing into commercial lumber.
>
> * * * * * * *
>
> *Flitch.*—A portion of a log sawed on two or more sides and intended for remanufacture into lumber or sliced or sawed veneer. The term is also applied to the resulting sheets of veneer laid together in sequence of cutting.

Wood Handbook, *supra,* at 485, 482. In the 1974 revised edition of this book, log is not defined. Flitch is defined in essentially the same manner as above, but the authors state that the term is loosely used.

Defendant asserts that the dyed, bonded, glued, and cold pressed sheets are not comprised within the Handbook's description of log or the first definition of flitch. Defendant also maintains that the second definition of flitch is limited to sheets immediately after removal from the log and placed together in sequence of cutting. This definition, defendant suggests, encompasses no further processing, such as that experienced during the production of Brookline veneers.

It is nevertheless not clear that the words log or flitch as provided by these definitions and enunciated by Congress in the provision defining wood veneers are precise and should be understood to mean log or flitch in a natural state. As Mr. Thommson's article appears to show, even the log used to produce ordinary wood veneers undergoes some processing thus transforming the article somewhat from its "natural" state. If we were to adopt defendant's reasoning, even ordinary wood veneers produced from these logs would be excluded from the classification of wood veneers.

Simple logic, however, dictates a different result. Tariff terms must be construed to avoid absurd or anomalous results. 2 R. Sturm, Customs Law & Administration § 51.4, at 29 (3d ed. 1986). Tariff terms thus encompass articles not known at the time of enactment if the new article possesses an essential resemblance to the one referred to in the statute. *Standard Surplus Sales,* 69 CCPA at 38, 667 F.2d at 1014 (1981); *FAG Bearings, Ltd.* v. *United States,* 9 CIT ——, Slip Op. 85–52 (1985). An unqualified provision for an article includes those made by artificial means in the absence of contrary legislative intent or administrative practice. *Joseph Weiss Co., Inc.* v. *United States,* 31 Cust. Ct. 17, 19, C.D. 1539 (1953).

Defendant has not shown an intent to require the use of a natural log or flitch in composing veneers. Rather, defendant draws a comparison between MICRO=LAM (a registered trademark) and the block from which Brookline veneers are sliced. Since MICRO=LAM is an end product used for structural purposes and apparently not for use in manufacturing wood veneers, the relevance of this comparison is unclear. Unlike MICRO=LAM, the Brookline block is used in the manufacture of wood veneers. Plaintiff's veneers are made by an advanced process and are state of the art within the industry. The character of the veneers which are sliced from the block, but for the detail and color of the product, does not differ from that of ordinary veneer.

Plaintiff has therefore successfully rebutted the presumption of correctness afforded Customs' classifications and persuaded us that log and flitch need not exist in a natural state. This result seems consistent with apparent Congressional intent to draw terms for the future encompassing articles not technologically feasible or otherwise unavailable at the time of enactment. Had Brookline veneers been known at the time of enactment of the TSUS, presumably Congress would have classified them as wood veneers. Therefore, plaintiff's merchandise was improperly classified as "articles not specially provided for, of wood," since there is a more specific provision for classification of them. Plaintiff's articles should be reclassified and reliquidated under TSUS Item 240.03 providing for the classification of wood veneers—other.

So Ordered.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSI
				Item No
C86/221	DiCarlo, J. December 19, 1986	Varon Handbags	84–9–01282	Item 656.2 25%, 23 21.3%, 17.5%
C86/222	DiCarlo, J. December 19, 1986	Zayre Corp.	84–6–00891	Item 379.9 27.5% p lb.
C86/223	Newman, S.J. December 19, 1986	Novatronics of Canada, Ltd.	82–9–01326	Item 628.2 11%
C86/224	Newman, S.J. December 19, 1986	Novatronics of Canada, Ltd.	83–8–01165	Item 682.2 10.3%
C86/225	DiCarlo, J. December 22, 1986	Edwin M. Knowles China Co.	84–6–00742	Item 533.1 26%
C86/226	DiCarlo, J. December 24, 1986	Measurex Corp.	83–4–00592	Various it number rates of

LASSIFICATION DECISIONS

SESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
lo. and rate	Item No. and rate		
.25 23.1%, 19.4% or	Item 745.68 Various rates	Agreed statement of facts	New York Clasps or parts thereof
.95 plus 23¢ per	Item 379.46 8%	Agreed statement of facts	Chicago Men's jackets
.25	Item 682.30 5.6	Agreed statement of facts	Buffalo Niagara Falls Motors
.25	Item 682.30 5.3%	Agreed statement of facts	Buffalo Niagara Falls Motors
.79	Item 534.94 17.4% or 15.8%	Agreed statement of facts	Chicago Coup-ehape porcelain plate blanks
item rs at various f duty	Item 800.00 Free of duty	Agreed statement of facts	San Francisco American goods returned; various computer parts

Appeals to the U.S. Court of Appeals for the Federal Circuit

Coastal States Marketing, Inc. v. United States, 10 CIT ——, Slip Op. 86–94, *appeal docketed,* No. 87–1061 (Fed. Cir. Nov. 12, 1986).

Miller & Co. v. United States, 10 CIT ——, Slip Op. 86–110, *appeal docketed,* No. 87–1083 (Fed. Cir. Nov. 26, 1986).

National Corn Growers Association. v. Von Raab, 10 CIT ——, Slip Op. 86–127, *appeal docketed,* No. 87–1118 (Fed. Cir. Dec. 18, 1986).

UST, Inc. v. United States, 10 CIT ——, Slip Op. 86–100, *appeal docketed,* No. 87–1134 (Fed. Cir. Jan. 5, 1987).

Nature's Farm Products, Inc. v. United States, 10 CIT ——, Slip Op. 86–108, *appeal docketed,* No. 87–1114 (Fed. Cir. Dec. 15, 1986).

Decisions of the U.S. Court of Appeals for the Federal Circuit

Pagoda Trading Corp. v. United States, 10 CIT ——, Slip Op. 86–87, *aff'd,* No. 86–750 (Fed. Cir. Nov. 3, 1986).

Yuri Fashions Co. v. United States, 10 CIT ——, Slip Op. 86–33, *aff'd,* No. 86–1126 (Fed. Cir. Nov. 18, 1986).

NEC Corp. v. United States, 10 CIT ——, Slip Op. 86–5, *aff'd,* Nos. 86–912/86–922 (Fed. Cir. Nov. 28, 1986).

RBW Inc. v. United States, 10 CIT ——, Slip Op. 86–8, *aff'd,* No. 86–1033 (Fed. Cir. Dec. 5, 1986).

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